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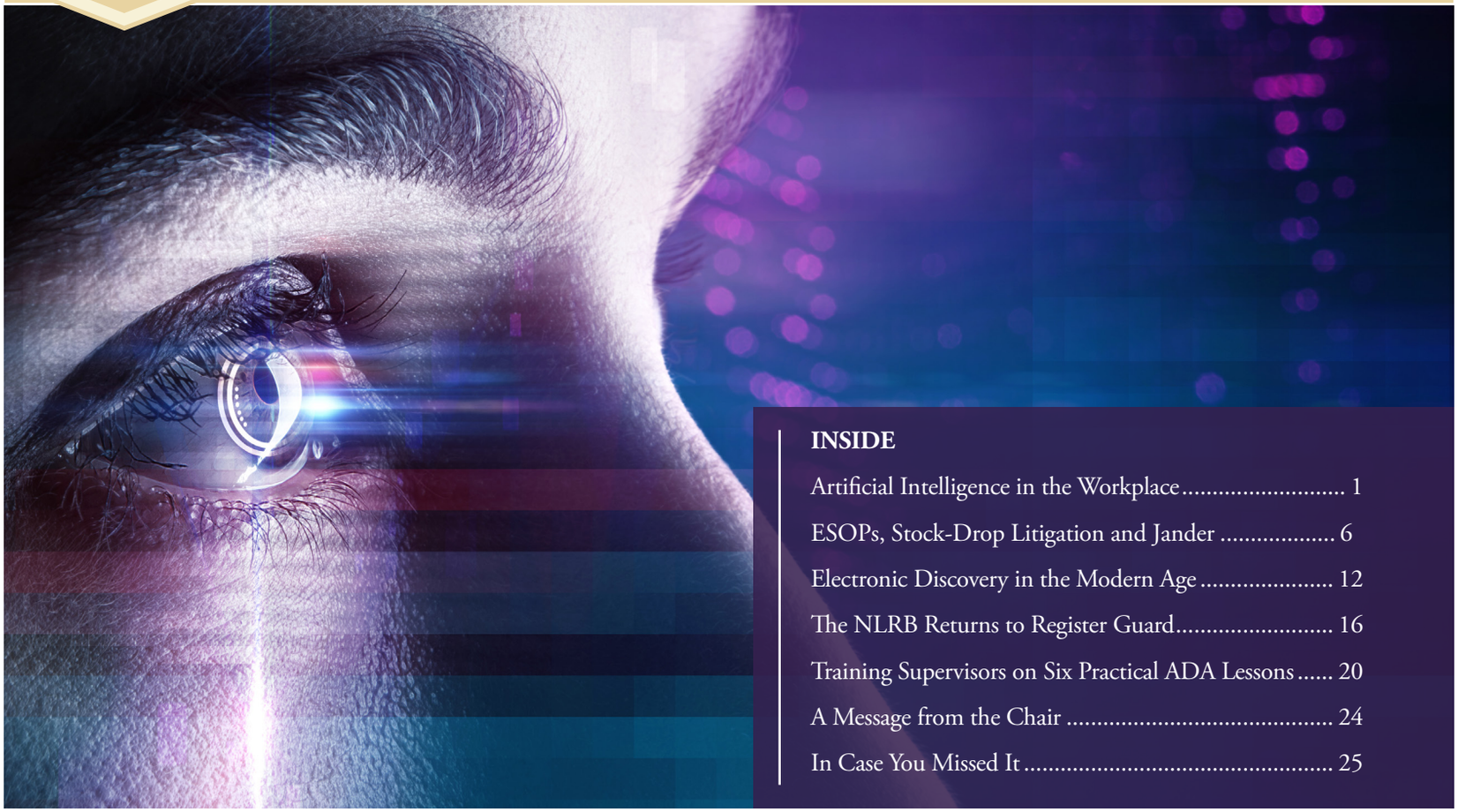

INSIDE

Artificial Intelligence in the Workplace

By Rick Bales

Artificial intelligence (AI) gathers and analyzes huge troughs of data to recognize patterns and predict future behavior. This is accomplished by creating algorithms that attempt to model high-level abstractions. For example, feed a computer a million images of cats with the label "cat," along with a similar number of images of other animals without the "cat" label, and the machine will "learn" through trial and error to distinguish cats from other four-legged creatures. Feed enough medical images to a computer and the job of radiologist may become obsolete. Key to the recent explosion of AI is the ubiquity of raw data, rapidly increasing computer power and the decreasing cost of using computers to analyze the data.

AI has become an indispensable tool in the hiring process for many companies. Johnson & Johnson receives 1.2 million applications each year for 25,000 open positions; AI systems use keyword searches to scan and sort applications much faster than a human can.[1] These systems also can be used to identify characteristics of applicants that correlate with job tenure, employee attitude, upward advancement, disciplinary record or personality fit with the company. For example, the company Nvidia created an applicant

(continued on pg. 2)

tracking software package which found that applicants submitting particularly long resumes tend to underperform on the job compared to their more concise peers.[2]

Another way AI is used in the hiring process is through pre-hire, video-recorded interviews.[3] Applicants are asked questions tailored to the open position. They digitally video record their answers, usually online from home or their current office, using their desktop or laptop computer. The video is then transmitted to a company that uses AI to analyze the applicant's language patterns, verbal skills, and emotions by, for example, identifying facial expressions, intonation, gestures and word choice. It then uses its machine learning algorithms to evaluate the candidates' work styles, predict their ability to work with others and assess general cognitive ability. Though AI's ability to predict applicants' future performance/fit/temperament may currently be crude, its predictive ability will increase exponentially over time, after it has been used to correlate the interview idiosyncrasies of millions of video recorded applicants with their success or failure on the job.

Many companies – and law firms – now are using video games in the hiring process.[4] Data from the game then can be analyzed by AI to evaluate the applicants' risk appetites, mental agility, persistence and ability to read emotional versus contextual clues.

After a company uses AI to hire an employee, it may use AI to track performance, determine pay, and make decisions about promotions and/or dismissal. One human resources service provider claims it can examine some 60 factors — such as time an employee takes between days off for vacations, changes in an individual's supervisor, and other seemingly innocuous considerations — to predict which employees are likely to quit, which are likely to be disgruntled and how the employer might retain the best employees.[5]

AI also is being used in increasingly sophisticated ways to monitor workers' every movement and thought. The company Cogito uses AI to listen to customer service calls and grade workers on empathy and how quickly and effectively they solve complaints.[6] Microsoft's MyAnalytics amalgamates data from a worker's emails, calendars, and phones to calculate how the worker spends her time, how often she is in touch with key contacts and whether she multitasks too frequently.[7] Veriato has produced software that registers everything that happens on a worker's keyboard; it can flag poor productivity, misconduct (such as stealing company records) and negative attitudes.[8] KeenCorp analyzes an employee's emails, focusing on word patterns and content, and then assigns each employee a number reflecting the employee's level of engagement.[9] OccupEye uses sensors on employees chairs indicate how often an employee is at her desk and how long she is on breaks.[10]

Ultrasonic wristbands issued by Amazon track workers' precise locations and hand movements, gauging workers' productivity and vibrating to nudge workers into being more efficient.[11] In 2018, Amazon patented a "haptic wristband" that observes employees' every movement, including quirks, fidgets and bathroom breaks.[12] "Smart glasses" improve peripheral or low light vision — but also enable an employer to see whatever an employee sees, as if looking through their eyes.[13] Companies have also updated the classic employee badge into a monitoring device. Humanyze requires its employees to wear an ID badge containing a microphone that records conversations, a Bluetooth and infrared sensor that monitors where they are (How long do they spend in the break room? Outside the building smoking?) and an accelerometer that notes when they move. The company's software collects data on how much time each worker spends talking with people, the gender of the person the worker is talking with and the proportion of time spent speaking versus listening.[14] Hitachi has created the "Business Microscope," a device affixed to a lanyard that serves as a security badge and key but also enables the company to know which workers are interacting with which others via a signal sent when two badge-wearing people are in proximity. This technology tells the company how often a worker talks to coworkers, how energetic and animated the conversation is and whether the employee is an active participant in meetings or group conversations.[15] Presumably the technology also has the capacity to record and store actual conversations.

In addition to monitoring on-duty conduct, AI enables employers to monitor off-duty (particularly online) conduct continuously and extensively.[16] Employers may have good reason to take advantage of this new technology. Racist or sexist posts may indicate a proclivity to racist or sexist conduct or harassment in the workplace. Aggressive posts may indicate a bullying personality. A post containing the company's name and words or phrases like "gun" or shoot" or "blow up" could be a red flag for impending workplace violence. Posts indicating illegal drug use or overconsumption of alcohol could raise workplace safety concerns. Posts

disparaging the company or its products could harm the company's reputation. Yet ubiquitous monitoring of off-duty conduct raises significant privacy concerns.

AI not only creates the potential for highly intrusive monitoring, but also raises questions about how employers will use the data they collect about employees' performance, with whom they will share it and how long they will keep it. AI-enhanced data collection, retention and analytic capabilities threaten to create a permanent record of employee productivity, activity and medical and physiological attributes – a "virtual resume" that potentially could follow a worker throughout her career. This raises a host of open legal and policy issues: First, do workers have an ownership interest in data compiled about them? If so, under what circumstances can they exclude others from seeing or using it? If not, do they have a right to access the data? Second, do they have any protection from this data being shared with others - such as to prospective employers - or does their data travel with them as a lifetime electronic resume that they can neither see nor rebut? Third, do workers have recourse if their data is incorrect and it is used in an adverse employment action or is shared with others?

The answer to all of these questions is that under existing law, workers have almost no rights over or access to their data, or rights to protection from data's misuse. Neither traditional privacy torts nor existing, federal electronic privacy statutes were developed with AI in mind. The California Consumer Privacy Act (CCPA),[17] modeled after the European General Data Protection Regulation (GDPR), contains a right to access one's data and a right to have personal data deleted, but was enacted with consumers – not employees – in mind.

Many law scholars have raised the issue of how using AI in the hiring process may be discriminatory.[18] However, it is unclear how employment discrimination law might apply to AI. AI might conceivably reduce employment discrimination – by, for example, taking humans and their (un)conscious biases out of the hiring process. However, if hiring algorithms reflect the biases of young white male algorithm writers, the algorithms will be garbage-in, garbage-out. Likewise, if a tech company uses algorithms directed to identify applicants who most closely match the company's most successful employees, the algorithm likely will disfavor applicants from groups underrepresented in the company's ranks, such as women and persons of color.

Finally, the use of AI in the workplace raises significant labor law issues. AI monitoring of workers can be used to listen to employees' conversations, record employee movements, monitor biological reactions, identify unhappy workers and identify participants in employee gatherings. These uses enable an employer to pinpoint union supporters, predict workers who might become union supporters and intimidate others.

Such uses of electronic monitoring poses a significant danger to workers' Section 7 rights under the National Labor Relations Act.[19] Section 7 protects employees from dismissal or other sanctions when they engage in any collective action with the aim of improving their position as employees. Thus, if an employer penalizes an employee for discussing or undertaking collective action around workplace issues, or attempts to intimidate or suppress workers' efforts to do so, it may violate the labor law.[20] Moreover, an action by an employer that restricts or "chills" these activities may be an unfair labor practice. For example, an employer social media policy that prohibits employees from using

Facebook to complain among themselves about their work may violate Section 7, as would any employer search of its employees' social media sites to ascertain whether one or more employees is engaged in union activity.[21]

Today's methods of surveillance are an even greater threat to workers' Section 7 rights than old-fashioned polls, cameras or even basic GPS trackers. Electronic badges, cell phone applications, RFID, wearable devices and other AI-enhanced surveillance devices can be used for legitimate purposes such as to improve productivity or prevent theft, but they can also be used to listen to employees' conversations, record employee movements, monitor biological reactions and identify participants in employee gatherings. These uses enable an employer to pinpoint union supporters and intimidate others. To date, however, there have been no cases considering when the use of advanced monitoring and AI, even for legitimate efficiency purposes, run afoul of the labor laws.

An employer's proposed use of AI for surveillance and monitoring of workers in an organized workforce may trigger a duty to bargain.[22] This duty will arise only if the devices are found to be "mandatory subjects of bargaining."[23] While the NLRB has found that the installation of GPS trackers and cameras are a mandatory subject of bargaining,[24] the issue of other monitoring devices is as yet an open question.

About the Author

Rick Bales is a law professor at Ohio Northern University (visiting at University of Akron 2018-20) and a part-time labor arbitrator throughout Ohio. His most recent book, "Cambridge Handbook of US Labor Law: Reinventing Labor Law for the 21st Century," was published by Cambridge University Press in January 2020.

This article is based on Bales' & Katherine V.W. Stone's, "The Invisible Web of Work: Artificial Intelligence and Electronic Surveillance, Under the Labor Laws," (41 Berkeley J. Empl. & Lab. L., forthcoming 2020. Full text, in draft form, available at https://papers.ssrn.com/abstract_id=3410655.)

Endnotes

[1]*Hire Education*, THE ECONOMIST (March 31, 2018), Special Report at 7-8.
[2]*Id.*
[3]*See* PAUL R. DAUGHERTY & H. JAMES WILSON, HUMAN + MACHINE: REIMAGINING WORK IN THE AGE OF AI 51 (2018); Bartleby: Get with the program, THE ECONOMIST 55 (June 23, 2018); *Hire Education*, *supra* note 1, at 8.
[4]DAUGHERTY & WILSON, *supra* note 3, at 51; in David D. Savage & Richard Bales, *Video Games in Job Interviews: Using Algorithms to Minimize Discrimination and Unconscious Bias*, 32 ABA J. LAB. & EMPLOY. L. 211, 215 nn. 37-42 (2017).
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[6]http://www.cogitocorp.com/.
[7]*Smile, you're on camera*, THE ECONOMIST (March 31, 2018), Special Report at 10.
[8]*Id.*
[9]Frank Partnoy, *The Secrets in Your Inbox*, THE ATLANTIC (Sept. 2018) at 26. "Heat maps", created by aggregating employees' engagement numbers by department or division, can ostensibly be used to flag when something has suddenly gone wrong in that department or division, such as noncompliance with government rules or sexual harassment. *Id.* at 29.
[10]Ryan Derousseau , *The Tech That Tracks Your Movements at Work*, BBC CAPITAL (June 14, 2017) available at http://www.bbc.com/capital/story/20170613-the-tech-that-tracks-your-movements-at-work.
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[12]Afeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Applications and Wearable Technology*, 63 ST. LOUIS U. L.J. 21, 34 (2019). See also CeylanYeginsu, *If Workers Slack Off, the Wristband Will Know. (And Amazon Has a Patent for It.)*, NEW YORK TIMES (Feb. 1, 2018), at https://www.nytimes.com/2018/02/01/technology/amazon-wristband-tracking-privacy.html.
[13]*Id.*
[14]https://www.humanyze.com/.
[15]See, e.g., 'Business Microscope' to track employees' every move at workplace, at https://www.thehindubusinessline.com/news/business-microscope-to-track-employees-every-move-at-workplace/article20723763.ece.
[16]For an example, Fama Technologies, Inc. uses artificial intelligence to comprehensively scan the public web and online social media to detect troubling images and to flag words that might indicate a propensity for harassment, bigotry, or undesirable behavior. See https://www.fama.io/social-media-background-checks-a2.
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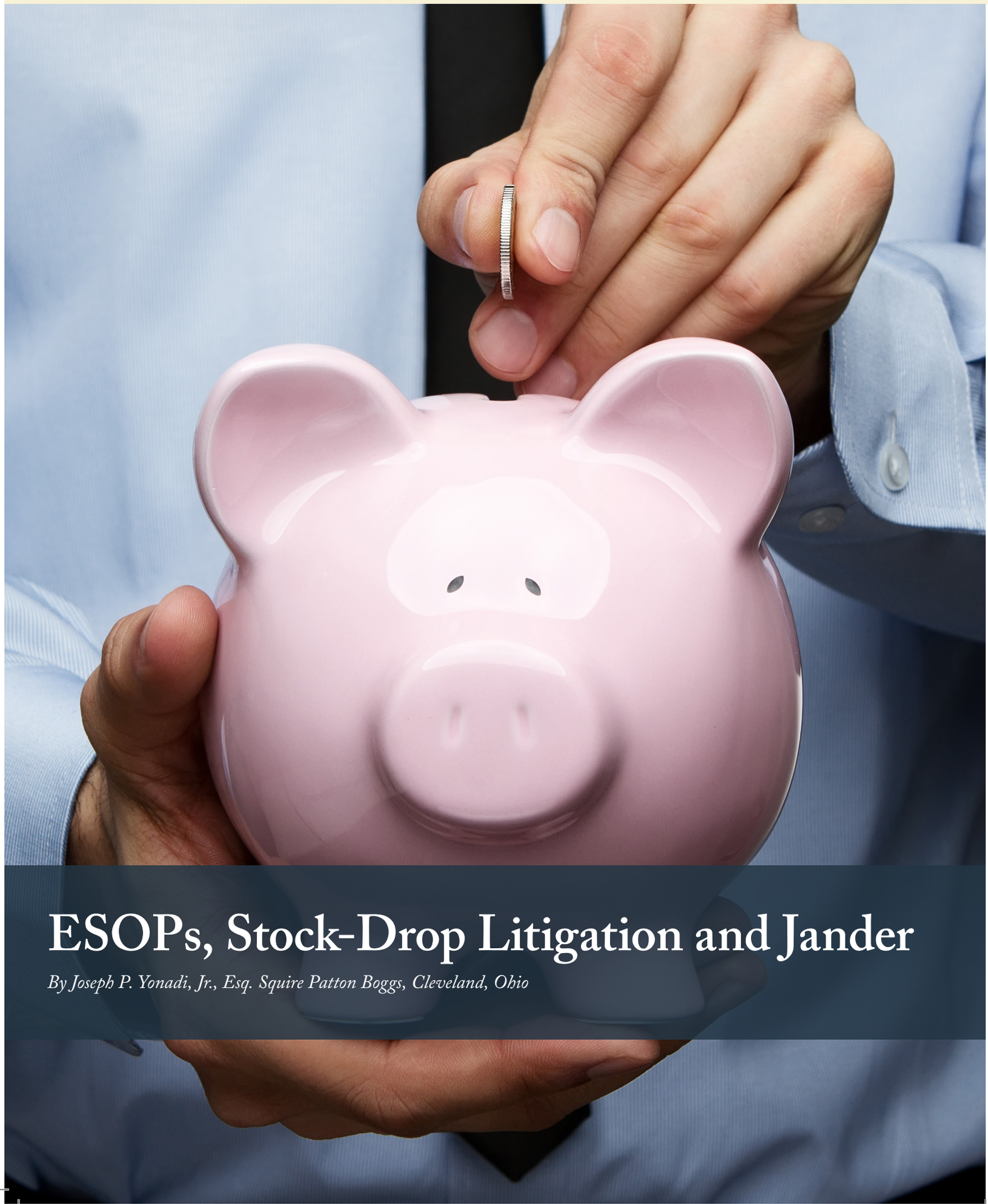
[18]*See, e.g.*, Jennifer Alsever, *Is Software Better at Managing People Than You Are?*, FORTUNE (Mar. 21, 2016, 9:00 AM), http://fortune.com/2016/03/21/software-algorithms-hiring/; Solon Barocas& Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016); Allan G. King & Marko J. Mrkonich, *"Big Data" and the Risk of Employment Discrimination*, 68 OKLA. L. REV. 555 (2016); Kevin McGowan, *Big Bad Data May Be Triggering Discrimination*, BLOOMBERG LAW (Aug. 15, 2016), https://bol.bna.com/big-bad-data-may-be-triggering-discrimination/; Dustin Volz, *Silicon Valley Thinks It Has the Answer to Its Diversity Problem*, THE ATLANTIC (Sept. 26, 2014), http://www.theatlantic.com/politics/archive/2014/09/silicon-valley-thinks-it-has-the-answer-to-its-diversity-problem/431334/.
[19]29 U.S.C. § 158.
[20]Eastex, Inc. v. NLRB, 437 U.S. 556 (1978).
[21]*See* Settlement Agreement, In re Am. Med. Response of Conn., Inc., No. 34-CA-12576 (N.L.R.B. Feb. 7, 2011), available at www.minnesotaemploymentlawreport.com/NLRB%20Facebook%20Settlement.pdf (settlement of case involving employee who had posted remarks on Facebook angrily implying that her supervisor was mentally ill and disparaging him with expletives).
[22]58 U.S.C. 158(a)(5).
[23]NLRB v. Wooster Div of Borg-Warner Corp, 356 U.S. 342 (1958).
[24]*Chemical Solvents*, Inc., 362 NLRB No. 164 (Aug. 24, 2015).



ESOPs, Stock-Drop Litigation and Jander

By Joseph P. Yonadi, Jr., Esq. Squire Patton Boggs, Cleveland, Ohio

After two and a half decades of litigating the duties of public company employee stock ownership plan (ESOP) fiduciaries, on January 14, 2020, the United States Supreme Court disappointed most of the industry when it vacated and remanded the Second Circuit's decision in *Retirement Plans Committee of IBM v. Jander*.[1] The much-anticipated case was set to clarify the Court's holding in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and potentially provide plaintiffs with a roadmap for success against ESOP fiduciaries. The following is an overview of the historical context of ESOP litigation and legal exposure that ESOP fiduciaries face in the wake of *Jander*.

The ERISA Landscape and the ESOP's Role in the Retirement Plan Industry

Employee benefit practitioners continue to digest the impact of the 2019 U.S. Supreme Court term on a seldom discussed law entitled, the Employee Retirement Income Security Act of 1974 (ERISA). For those who are not versed in jurisprudence of employee benefit plan litigation, ERISA is the federal statute that governs private retirement plans, such as 401(k) plans. Over the past few decades ERISA has found itself in the crosshairs of the nation's most contentious employee benefit plan litigation ranging from so-called "stock-drop" litigation, to overfunded pension plans, and excessive retirement plan fees.

To provide some historical background, ERISA was born out of the Studebaker bankruptcy in the early 1960s, which resulted in 4,400 workers with vested pension benefits losing some or all of their pensions when their pension plan was terminated due to an automobile plant shutdown in South Bend, Indiana. Sixty years later and with trillions of dollars at stake, retirement plans are still taking center stage in the nation's highest courts.[2] The Investment Company Institute estimated that heading into the fourth quarter of 2019 retirement plan assets were $30.1 trillion, with $8.5 trillion alone in defined contribution retirement plans.[3] Last year's headline ERISA case related to a special subset of retirement plans known as ESOPs.

ESOPs are qualified retirement plans designed to invest primarily in employer securities. Though these retirement plans existed, both in practice and in theory, prior to the enactment of ERISA,[4] Congress statutorily provided a variety of tax incentives to encourage the use of ESOPs as a way to finance retirement plan contributions in the mid 1980's.

Public company ESOPs and ESOP components of 401(k) plans, otherwise known as KSOPs, became vogue in the late 1980s as a potential defense to hostile takeovers.[5] The strategy utilized was that a public company would sell a percentage of its stock to an ESOP in order to provide employees with the opportunity to enjoy equity ownership in the company, thereby aligning incentives for employees to increase profitability and shareholder value. In addition to the ESOP, most companies would incorporate in a pro-corporate Delaware law jurisdiction that contains anti-hostile takeover provisions that prevents would-be corporate raiders from merging the target company or selling company assets unless they acquire more than 85% of the publicly traded stock in a single tender.[6] Leveraging this 85% threshold, public companies began creating 15% ESOPs to place shares in friendly hands, thereby defending against hostile takeover attempts.

Fast forward to today and around 415 public company have ESOPs or KSOPs, which amounts to approximately 11 million participants, $126 billion in employer securities, and US $1.1 trillion in total ESOP/KSOP plan assets.[7] Given the vast amount of wealth contained in these plans, it is evident that these retirement vehicles are not only important to the employees who participate in them, but to the economy as a whole. However, administering these plans can carry unique risk, as corporate executives often are forced to wear dueling and conflicting hats as both a corporate fiduciary and an ESOP fiduciary.

In the early 2000s, with large dollars continuing to pile into public company ESOPs, plan administrators experienced a wave lawsuits as stock values dropped due to the deflating tech bubble, which inevitably led to a significant loss of value in ESOP retirement plan balances.[8] These types of lawsuits became so popular that they were coined "stock-drop" cases; however, a majority of these cases were dead on arrival and dismissed at the pleading stage due to a court-created presumption of fiduciary prudence, as set forth in *Moench v. Robertson*.[9] The *Moench* presumption stood for decades — that is, until the Sixth Circuit disagreed and forced the Supreme Court to weigh in.

Presumption of Prudence Does Not Apply to an ESOP

Under ERISA fiduciary law, fiduciaries owe a duty of prudence whereby such fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purposes of:

- Providing benefits to participants and their beneficiaries, and
- With the care, skill, prudence, and diligence… prevailing a prudent man acting in a like capacity and familiar with such matters."[10]

ERISA practitioners know this as the "Prudent Man Standard of Care" or the "Presumption of Prudence Standard." In addition, ERISA provides a duty to diversify a retirement plan's assets in order to decrease its risk of loss.[11] In 1995, the Third Circuit, in *Moench*, analyzed legislative intent and statutory construction of the ERISA ESOP statutes, stating that "ESOP fiduciaries are exempt from the presumption of prudence duty as it relates to the diversification requirement … [and] under normal circumstances, ESOP fiduciaries cannot be taken to task for failing to diversify investments".[12] The court further justified its reasoning by pointing out that ESOPs were "designed to invest primarily in qualifying employer securities."[13] This decision stood for the next two and a half decades, until *Dudenhoeffer*.

***Dudenhoeffer* – No ESOP Fiduciary Presumption of Prudence**

To set the stage and provide historical context to *Dudenhoeffer* decision, think retirement plan investing during subprime lending crisis and pre-Great Recession. *Dudenhoeffer* centered on Fifth Third Bancorp's sponsored a 401(k) savings and ESOP plans. Under these plans, employer-matching contribution were automatically invested into Fifth Third stock via the ESOP.[14] Unfortunate for plan participants, the subprime crisis caused Fifth Third's stock to plummet 74% between July 2007 and September 2009. Then, in July 2007, plan participants sued the ESOP fiduciaries, claiming that company stock was overvalued and an excessively risky investment.

The Fifth Third employees and ESOP participants (the plaintiffs) alleged that publicly available information, such as newspapers, provided early warning signs that subprime lending was risky, and further alleged that the retirement plan fiduciaries had non-public knowledge of financial statement misstatements that caused the Fifth Third stock to become overvalued.[5] In addition, the plaintiffs alleged that a prudent fiduciary would have responded to this information in the following fashion:

- By selling the ESOP holdings of Fifth Third stock before the stock declined;
- By refraining from purchasing more Fifth Third stock;
- By removing the retirement plan's ESOP component; and
- By disclosing insider information so that the market would adjust its valuation of Fifth Third stock downward and the ESOP would no longer overpay for such stock.[16]

The district court used the *Moench* presumption of prudence to dismiss the plaintiff's lawsuit on the premise that "plan fiduciaries start with a presumption that their decision to remain invested in employer securities was reasonable." However, the Sixth Circuit Court of Appeals reversed on grounds that, though a presumption may exist, such presumption does not apply at the pleading stage. Moreover, the Sixth Circuit found that the allegations contained in the complaint were sufficient to state a claim for a breach of fiduciary duty. The Sixth Circuit ultimately held that the plaintiff "need not show that an employer is on the brink of collapse…[but] only show that a prudent fiduciary acting under similar circumstances would have made a different investment decision."[17]

The Supreme Court went even further, stating that no special presumption applies to ESOP fiduciaries.[18] The Court arrived at this conclusion by analyzing statutory language; the Court reasoned that, though an ESOP fiduciary is exempt from diversification requirements, there is no basis to altogether exempt fiduciaries from a duty of prudence.[19]

The Corporate Insider – Wearing Two Hats Problem

The retirement plan community generally accepted the *Dudenhoeffer* Court's interpretation of ERISA as consistent with both the statutory intent and trust law, generally. However, adhering to this duty created an "elephant in the room" for public company fiduciaries, who were also insiders. A majority of retirement plan fiduciaries wear two hats — they are both officers of the company, generally chief financial officers or vice presidents of human resources, and they are fiduciaries of the company's retirement plans. This duality places many executives and corporate committees in conflicting positions, as it was not clear to what extent they were required to act upon insider information for the benefit of the ESOP.

Dual Roadmaps for ESOP Fiduciaries and Plaintiffs
For public company ESOP fiduciaries, the Supreme Court in *Dudenhoeffer* provided that, absent "special circumstances," there is no need for a fiduciary to attempt to determine if company stock is over or under valued.[20] The Supreme Court made clear that it is not a fiduciary's job to predict the company's stock performance.

Conversely, in order for a plaintiff to state a claim for breach of the duty of prudence, such plaintiff must provide an alternative action that a prudent fiduciary in the same circumstances could have taken that would have been both, consistent with securities laws and done "more harm than good."[21]

However, the Supreme Court clarified that an ESOP fiduciary should not be required to divulge inside information at the risk of violating securities laws.[22] Nor should the fiduciary be required to stop investments to an ESOP, as such action could be highlighted it in the marketplace, which in and of itself could cause the stock value to drop. The Dudenehoeffer opinion acknowledges that courts are required to consider the extent to which an ERISA-based obligation could conflict with the insider trading and corporate disclosure rules. After establishing a new framework, the *Dudenhoeffer* Court vacated the Sixth Circuit decision and remanding the case for further proceedings.

Legal scholars would debate the "special circumstances" language penned by Justice Breyer over the next five years. Most commentators, however, came to agree that meeting the "special circumstances" threshold would take financial fraud or, at a minimum, an accounting irregularity known by an insider fiduciary. Fast forward to 2018, with a bevy of stock-drop plaintiff cases in its wake, the Supreme Court got another bite at the apple to explain its "special circumstances" language.

A Rare Stock-Drop Win for ERISA Plaintiff Attorneys
Jander created the perfect storm to test the "special circumstances" threshold and insider disclosure theories established in Dudenehoeffer. The case centered on IBM's retirement plan fiduciary committee, which included the chief accounting officer and chief financial officer. The committee permitted the ESOP to continue investing in IBM stock while simultaneously selling off a division of the company that would ultimately trigger a $4.7 billion write-down. This write-down caused the company's stock to drop by $12 per share. The issue presented to the Second Circuit was whether IBM's executive insiders, who were also on the retirement plan committee, had breached ERISA's duty of prudence by failing to disclose insider information that would eventually cause the stock value to drop.

In a surprising win for the plaintiffs, the Second Circuit reversed the district court decision, holding that the plaintiffs had plead a plausible claim for violation of ERISA's duty of prudence. To support its decision the court noted the following:

- The ESOP fiduciaries knew the stock was inflated through accounting violations;
- They had the power to disclose the accounting violations; and
- They failed to promptly disclose the true value of the division.[23]

The Second Circuit ultimately hung its hat on an "inevitable disclosure" theory – that is, if plan fiduciaries knew that disclosure of the insider information was inevitable, then delaying such disclosure could cause more harm than good to the ESOP plan.

It should also be noted that several federal agencies, including the US Securities and Exchange Commission (SEC), joined in submitting an amicus brief. These amicus requested the Court to reverse the Second Circuit decision and hold that, absent extraordinary circumstances, ERISA fiduciaries have only a limited duty to disclose *material*, nonpublic information regarding a company's publicly traded stock, particularly when doing so would do more harm than good.[24]

This is an important amicus, as the Court tends give weight to government agencies with specific expertise.

The Supremes – The *Jander* ESOP Fiduciary and Plaintiff Roadmap

Though brief, the Supreme Court's *Jander* decision is instructive to both lower courts and ESOP fiduciaries. First, it reiterates that the "more harm than good" standard is the correct standard for evaluating ESOP fiduciaries. Second, it reinforces that the "duty of prudence does not require fiduciaries to break the law" by disclosing financial information in violation of securities laws.[25]

The *Jander* decision also highlights the fact that the two-hat issue remains unresolved and appears dependent on the future guidance provided by the SEC. In recognition of this, the opinion briefly noted that lower courts should weigh an ESOP fiduciary's ERISA-based obligations against disclosing inside information that could conflict with the SEC corporate disclosure requirements. In addition, the Court informs lower courts on appropriate pleading standard – that is, it instructs courts to assess whether a complaint has sufficiently alleged that a defendant did "more harm than good" by choosing one course of action over another.

Most ESOP fiduciaries were hoping that *Jander* would end the wave of stock-drop litigation, but there is little

doubt – *Jander* will not be the end. Still, the "more harm than good" disclosure standard remains a difficult hurdle for plaintiffs and a strong shield for plan fiduciaries.

Stock-Drop Litigation Road Ahead for ESOP Fiduciaries

As previously mentioned, many ESOP fiduciaries have the burden of wearing "two hats." They wear the hat of a business executive, having a duty to operate the business using business judgment with the best interest of shareholders in mind, and they also wear a hat of ERISA fiduciary, having a duty to ensure the ESOP is operated in the best interests of plan participants and beneficiaries. These dueling roles can be at odds when determining whether public company stock should continue to be utilized as an investment option in qualified retirement plan, such as an ESOP.

However, companies do have tools available to help insulate ESOP fiduciaries from stock-drop complaints. An ESOP fiduciary may utilize the ESOP plan document as a shield if such document incorporates language requiring employer contributions to be invested in employer stock. Plan provisions requiring investments into a certain asset may reduce the decision to a settlor function, as opposed to a fiduciary function, allowing the decision-maker to avoid the strict ERISA fiduciary duties altogether.

Further, ESOP fiduciaries should heed the advice of the Supreme Court in Tibble v. Edison, which established that ERISA investment fiduciaries have "a continuing duty to monitor investments."[26] As the Court expressly stated in *Dudenhoeffer*, sponsor company stock is no different from any other investment. As such, fiduciaries should monitor ESOP or KSOP company stock as if it were no different from any other investment. Thus, it is profoundly important for plan fiduciaries to be proactive in establishing, engaging, and documenting a process that monitors the plan's investment performance. And, above all, fiduciaries should remember that "a pure heart and an empty head are not enough" to overcome the duty of prudence.[27]

Endnotes

[1]*Retirement Plans Committee of IBM v. Jander*, 2020 WL 201024 (S. Ct. 2020).

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[3]Investment Company Institute Research Report, America Views on Defined Contribution Plan Savings, 2019 (January 2020) found at https://www.ici.org/pdf/20_ppr_dc_plan_saving.pdf.

[4]IRS Rev. Rul. 69-65.

[5]See, *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257 (Del. Ch. 1989).

[6]8 Del. C. § 203.

[7]National Center for Employee Ownership, "Employee Ownership by the Numbers," (September 2019, page 2).

[8]The John Marshall Law Review, "ERISA Stock Drop Cases: An Evolving Standard, 38 J. Marshall L. Rev. 889 (2005).

[9]*Moench v. Robertson*, 62 F.3d 553, (3rd Cir. 1995).

[10]ERISA Section 404(a).

[11]ERISA Section 404(a)(1)(C).

[12]*Moenchat* 568.

[13]*Id* at 569.

[14]*Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (U.S. Supr. Ct., 2014).

[15]*Id* at 413.

[16]*Id*.

[17]*Id* at 418.

[18]*Id* at 418-419.

[19]*Id*.

[20]*Id* at 426.

[21]*Id* at 428.

[22]*Id* at 429.

[23]*Jander v. Retirement Plan Committee of IBM*, 910 F.3d 620 (2018).

[24]*Retirement Plans Committee of IBM v. Larry W. Jander*, Brief for the United Stated as Amicus Curiae Supporting Neither Party.

[25]*Retirement Plans Committee of IBM v. Jander*, at _____ (page 1).

[26]*Tibble v. Edison, Int'l*, 135 S. Ct. 2459 (May 18, 2015).

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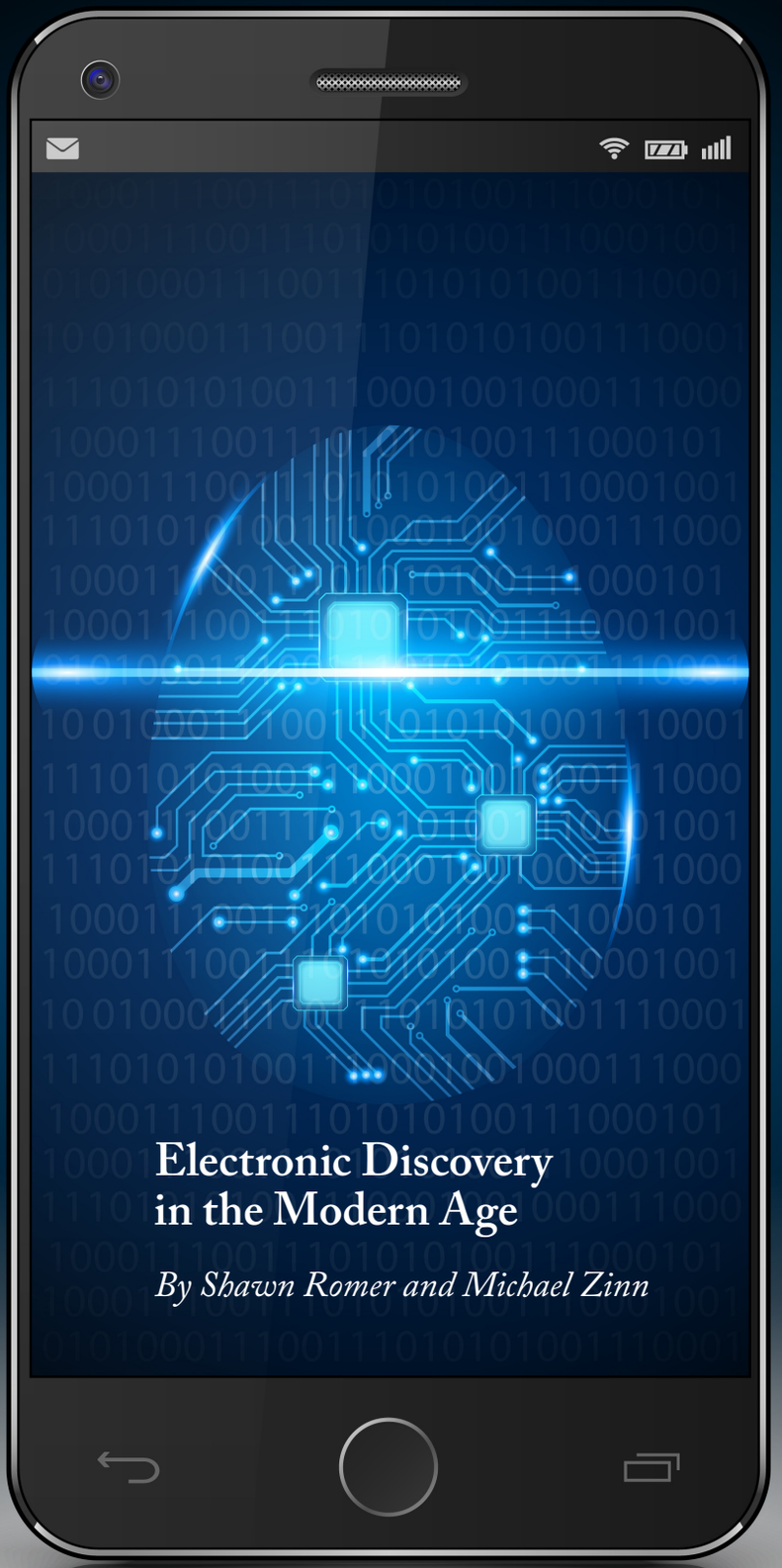

Electronic Discovery in the Modern Age

By Shawn Romer and Michael Zinn

Previously, when someone responded to or received documents in discovery, they would have thought of large stacks of papers that came from file cabinets with a numbered bates stamps at the bottom right hand corner of each page. This is now the wrong way to think, as most if not all data is stored electronically. Consequently, it can sometimes be difficult to find particular information, or it can be easily hidden or destroyed. Sometimes attorneys are intimidated by the cost or complexity of electronic discovery (e-discovery). However, many will be surprised that engaging in at least some e-discovery is not as intimidating as they thought and is necessary to advocate zealously for your client.

Why Do You Need a Forensic Expert?

Electronic discovery is all about obtaining electronically stored information (ESI) as part of the discovery process. Because of the volume of ESI and how easily it can be modified, it is important that there be a way to copy ESI so that the authenticity of the original can be examined. This is when forensic imaging becomes critical. A qualified person can create a forensic image of ESI – an exact duplicate of information stored on an electronic device that often is self-authenticating. The term of art "forensic collection" refers to collecting ESI in a forensically sound way. You may encounter experts using the terms "forensic collection," "forensic acquisition" and/or "forensic imaging" interchangeably. These terms may have subtle differences. However, as they are used in the industry, these terms are generally understood to refer to obtaining an exact copy of ESI so that it may be authenticated and the results obtained by the forensic expert are reproducible. In instances where the results obtained by the forensic expert are not reproducible, one should request an explanation as to why the results cannot be reproduced and consider whether that impacts your ability to introduce the ESI in court.

Do You Need a Forensic Expert to Create a Forensic Image?

Federal Rules of Evidence (FRE) § 902, specifically §§ 902(13) and 902(14), provide some high-level direction. FRE§ 902 deals with authentication and identification. From the point of view of a forensic expert, one of the key requirements in FRE §§ 902(13) and FRE 902(14) is that the ESI must be certified by a qualified person. You might not need a forensic expert to testify in court, but the qualified person should be someone who is able to do so if the case requires it. To avoid as much perception of bias as you can, the better approach is to hire an independent expert to authenticate the ESI instead of an internal IT person. Hiring an outside expert can help obviate any perception of bias that an internal IT person might have towards his/her current employer.

There are several other reasons why you may require the services of a forensic expert. Digital forensics is a specialized form of e-discovery. If you need to see what information was deleted from a computer or a mobile phone, you may require the services of a forensic expert. If ESI cannot be self-authenticated – which is not uncommon when collecting ESI from mobile phones – an expert may be required.

Cell Phones

Most people have a wealth of information on their cell phone. It is important to move quickly to secure any device that contains ESI relevant to your case. Have a forensic expert image the ESI as soon as possible. The longer the device where the information is stored is used, the less likely it will be possible to recover deleted information from the device. Request all devices that may store ESI relevant to your case. If the other party argues that they are not in control of the device, subpoena the third party who supposedly is in control for production of the device to be imaged. Do not forget about other personal devices that may have employer information on them (such as tablets, iPads, etc.). Identify alternate sources of information. If the cell phone does not have the information you are looking for on it, then request the backups, which may be stored in the cloud. A good example of this is the iCloud upon which iPhones normally back-up information. Cell phone backups can also be found on laptops, computers, in other cloud-based storage or other locations.

After you have authorized possession of the cell phone, the first thing to ensure is to leave it in its current state. If it is turned on, leave it turned on. If it is turned off, leave it turned off. If it is turned on, place it in a faraday bag.[1] If you do not have a faraday bag, put it in airplane mode and write down the date and time that you put it in airplane mode. Contact your forensic expert and have them image the cell phone. There are different methods for accomplishing this, and they might depend on the type of phone, the version of the

operating system installed on the phone and settings on the phone. If you have questions about what the forensic expert plans on doing to make an image of the phone, contact them. They should be able to explain what they are doing, how they are doing it and why they are doing it that way. If something they say does not make sense, ask them to explain it to you.

One of the worst ways to try to obtain substantive information from a cell phone is to contact the provider. While the larger providers may keep records of the telephone numbers from and to which calls and texts are exchanged, most will not commit to keeping the content of any text messages. As an example, Verizon only keeps the content of text messages on their server for three to five days, which is the longest of the major providers. Some providers have no guarantee that the content of text messages is stored on their server. Consequently, the best way to recover information is from the cell phone itself, which is another reason to hire a forensic expert. Some courts will find that making clones of phones by forensic experts to be intrusive when the information is otherwise available, but some will allow it.[2] You will find that attempting to image the phone may very well be worth it because it generally falls below $1,000 and can uncover very important information. While we are a society that is becoming more and more careful with what we type in emails, we for whatever reason do not seem to place the same amount of care when texting. Consequently, the most unfiltered information may be extracted from these texts and can be valuable to your position in a dispute.

Also, as a word of caution, counsel should be careful about relying on their client to search their own cell phone. In Lawrence v. City of New York,[3] a plaintiff claimed that she conducted a search on her cell phone at her lawyer's request right after she was involved in a car accident. The lawyer obtained PDF copies of the photos from the plaintiff that supposedly showed the severity of the accident, but they were produced without the appropriate metadata.[4] When the opposing side received native[5] copies of the files, the metadata showed that the pictures were not taken on the date the client claimed and instead were taken much later. As a sanction, the judge dismissed the case. Thus, it is highly suggested that counsel not rely on clients for text message searches and instead, lawyers should be involved in the search to ensure that this does not happen.

An Explanation of Metadata

Oftentimes, metadata is available on a computer or phone, and it may offer insight into other locations where responsive ESI may be located. In certain situations when the responsive ESI is not found on a specific device, metadata may indicate other locations where the responsive ESI was as of a given date and time. In the event metadata points to a separate location where the responsive ESI could be found (e.g. cloud storage or a specific removable USB storage device), you will want to have someone properly obtain it from that source.

For example, suppose your client is an employer and the employee deleted a substantial number of employer-owned documents from his or her company laptop. You hire a forensic expert to search for any files on the hard drive that contain certain terms between two dates. You further request that the expert search for any indication that the responsive files were copied to one or more additional storage devices (e.g. hard drives, USB storage devices, etc.). The expert removes the hard drive from the laptop and physically acquires the data on it. Upon examining the data found on the hard drive, the employer-owned documents are not found. However, the expert identifies file names that themselves are responsive to the request for information sent to the expert, though the file names have a modified date that is within the responsive timeframe. The responsive metadata also identifies that those files were located at "R:\stolen employer documents\confidential employer documents\ my files." The forensic examiner can search for more metadata that might reveal information that can be used to verify the identity of the device where the employer-owned documents were stored. The forensic examiner then looks and confirms that the device upon which data was transferred from the computer is a USB device, and that device was last connected to the computer three days before the employee resigned. This is one example of how metadata can be used to reveal circumstantial evidence that files were retained by the employee.

This is the power of metadata. It is not perfect, but it can get you much closer to what you are looking for. There are legal and technical arguments to be made by both sides in the scenario given above but when faced with that information, the former employee may admit to copying

the employer-owned files to their own USB storage device and deleting the same from the employer owned laptop. Consequently, spoliation may be shown, or in some circumstances, this may form the basis for asserting a trade secret theft counterclaim against that former employee.

Recovering "Deleted" Information From Any Device

The process for recovering deleted information from electronic devices depends on several factors. The following are some of the key factors that you should take into account when considering obtaining electronic forensic evidence:

1. What is the native file format of the information that was deleted;
2. From which device was the information deleted;
3. How long has it been since the information was deleted; and
4. Has the device from which the information was deleted been powered on and/or off or used since the information was deleted?

Recovering deleted information from laptops and workstations is often easier than from some cell phones. When a file is deleted, typically the information in the file is not actually deleted. The information regarding where the information is stored is removed, and the space is marked as available if the device needs to write more data over the data already contained in this space. Explained in another way, deleting a file is like going to a library, going to the index cards that tell you the name of the book and where it is located in the library, and then ripping up the index card. The book still exists. If you know the location of the book and go to it, you can find the book. The book is available until another book is substituted.

For electronic devices, when the index card is destroyed, the space that the file uses is marked as "unused," even though previously stored data is still in that space. "Unused" space can be used to write new data. The longer a device is powered on or the longer a device is used, the greater the chances are that the unused space (where the contents of the deleted file are stored) will be overwritten with a new file (i.e. a new book put in its place).

Sometimes it is possible to recover part, but not all, of a file. Again, this is often due to the original file being partially overwritten after it was deleted. Consequently, it is possible to retrieve some files that a user "deleted." A properly trained forensic expert is your best resource if you are trying to collect those files.

Conclusion

In conclusion, collecting forensic data from electronic devices is highly specialized. Just like we might hire an economist to fully account for the claimed damages in a case, an electronic forensic expert will be able to handle the highly complicated task of collecting electronic evidence that will be helpful to your position in a case. While some may be afraid of the cost of doing so, the services you get in return are often vital to the proper litigation of a dispute.

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Endnotes

[1]Faraday protection blocks wireless signals. For more information on why faraday protection is important for electronic evidence, please read https://www.theregister.co.uk/2014/10/10/police_say_criminals_remotely_wiping_seized_mobes/.

[2]*See generally, Santana v. MKA2 Enters*, D. Kan. No. 18-2094-DDC-Tjj, 2019 U.S. Dist. Lexis 2904 (Jan 8, 2019)

[3]2019 U.S. Dist. Lexis 126010 (S.D.N.Y. 2018)

[4]Metadata is data about more data.

[5]Native files are copies of the original file with all of the metadata intact. PDF copies, on the other hand, are more like taking a picture of the document (which does not capture metadata related to when the file was created and/or if it was modified, *inter alia*.).

The NLRB Returns to Register Guard

By Alan L. Zmija

Perhaps one of the most controversial decisions issued by the National Labor Relations Board (NLRB) was Purple Communications.[1] Issued in 2014, it changed a long-established policy prohibiting the use of employer property by employees when engaged in protected activities. Purple Communications broke with past precedent and concluded that in certain circumstances employees could use an employer's email system to engage in such activities. Recently, Purple Communications was overruled by a divided Board in Caesar's Entertainment.[2]

Background

Section 7 of the National Labor Relations Act guarantees the right of employees to join or not join labor organizations for the purpose of collective bargaining.[3] Critical to this guarantee is the need to have communication among workers to disseminate information. In the landmark decision of Republic Aviation Corp v. NLRB,[4] the Supreme Court approved the principle that employees could engage in solicitation for union purposes on company property outside working hours, i.e., whether before or after work, or during lunch or rest breaks.[5] It has been equally true that the right to communicate *on* employer property does not include the opportunity to use an employer's personal property.[6] The board had consistently held that employees, absent discrimination, had no right to use employer bulletin boards, telephones, televisions or public address systems.[7]

With the expansion of electronic technology, the board had an opportunity to examine whether employees could use an employer's email system for protected activities. In Register Guard a divided board upheld an employer's "Communications Systems Policy" which, in effect, restricted employee use of the company's email system and prevented union organizational efforts. In finding the policy lawful and non-discriminatory the board also established a novel and controversial approach for evaluating anti-union discrimination.[8]

Seven years later, with a different board, the issue of email use by employees was revisited in Purple Communications. At issue was the lawfulness of an employer electronic communications policy which, in part, prohibited employees from engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company and from sending uninvited emails of a personal nature.[9] The board majority highlighted the importance of employee communication in the workplace in regard to protecting workers' Section 7 rights. In a lengthy decision, they discussed

the importance of emails in our modern workplace and distinguished them from other means of communication like bulletin boards, telephones or copy machines.

Using a familiar balancing approach, the board compared an employer's property rights against an employee's Section 7 rights and concluded that, under limited circumstances, employees have the right to use an employer's email for union and organizational activities. Register Guard was overruled. The board found that in order to use the system, employees had to already have been granted access to the email system in the course of their work, and the communication could only be done on nonwork time.[10]

On Dec. 16, 2019, in Caesars Entertainment, a new board reversed Purple Communication and returned to the Register Guard standard. Employers may establish and apply non-discriminatory rules prohibiting employee use of its property, including email systems.

Caesars Entertainment – The Board Majority

Caesars Entertainment is a Las Vegas casino and hotel which employs about three thousand workers. As relevant here, it maintains work rules in its employee handbook titled "Computer Usage." Specifically, under "General Restrictions" the policy notes that computer resources may not be used to send chain letters or other forms of nonbusiness information. The policy also provides that employees are not to visit inappropriate websites and should limit the use of personal email.[11] The complaint also alleged that other computer and "noncomputer" rules were unlawful but these were not specifically addressed in the board decision.[12]

The majority indicated that the question presented in Caesars was whether property rights must give way where employees seek to use the employer's IT resources for Section 7 activity. The Board overruled Purple Communications stating in that decision an employer's property rights in their IT resources were discounted while the importance of those resources to Section 7 activity were overstated. Applying the Register Guard standard the board found that employees have no statutory rights to use employer equipment, including IT resources, for Section 7 purposes. Only in rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another will an exception apply. That was not the situation in Caesars.

Looking to Register Guard, the majority rejected the argument that rules governing employee's use of workplace email should be analyzed under the balancing test articulated in Republic Aviation. Absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications.[13]

The board noted that employees are not entitled to use a medium of communication simply because the employer is using it. In the typical workplace, oral solicitation and face-to-face literature distribution provide more than adequate avenues of communication. In modern workplaces employees also have access to personal smart phones, email accounts and social media which provide additional means of communication. An employer does not violate the NLRA by restricting the nonbusiness use of IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.

Caesars Entertainment – The Dissent

Board member Lauren McFerran wrote the dissent in Caesars Entertainment.[14] She stated that Purple Communications was limited in scope and legally correct. The decision carefully balanced employees' statutory rights and employers' legitimate interests. It only applied to employees who had access to an employer's email system in the course of their work and restricted their use to nonwork time. She stated that the board, in Purple Communications, rejected Register Guard for three reasons: 1) it undervalued employees core Section 7 rights while giving too much weight to an employer's property rights; 2) it failed to perceive the importance of emails as a means by which employees engaged in protected activity, and 3) it placed too much weight on the board's equipment decisions.

Member McFerran suggested that the proper balance should not be the employer's property rights but the lesser managerial interests. Under this theory the employer's restrictions on employees' rights will be lawful only when it is necessary to maintain production or discipline. She took issue with the majority's consideration of employees' alternate means of communication arguing that such analysis is unwarranted.

Finally, the dissent discussed the importance of electronic mail in the modern workplace stating there is virtually no other means of communication that is even a rough equivalent. Employees need not work at the same time, the same place and never need to meet face-to-face in order to communicate. She concluded by stating the majority decision is not simply bad policy, it is arbitrary and inconsistent with the requirements of reasoned decision making.

Caesars Entertainment – Takeaways

Caesars Entertainment marks a return to the long established NLRB policy that heavily favors employer property rights over employee Section 7 rights. Essentially it eliminates any balancing of these rights and concludes that there is no statutory right for employees to use an employer's property. Unlike Purple Communications it is relatively simple to apply – just say no.

Purple Communications was a laudable effort by a progressive board to increase the avenues of Section 7 communication to employees in the modern workplace. Unfortunately, it overstepped and diminished the sanctity of employer's property rights.

Purple was unworkable and brought with it a whole new set of issues. Although member McFerran is correct in arguing that it was limited in scope and applied only to employees who used computers for work and then only on their own work time, the policy was difficult to apply. Perhaps the direct financial impact of the policy on the employer was minimal but nonmonetary factors in managing the policy were significant. How does an employer lawfully monitor its computer systems and what about issues of illegal surveillance? What about employees having different nonwork times? If employees download hard copies who pays the cost? What about system security or hacking and the damages incurred? Will it be necessary for an employer to check all employee emails and hire additional personnel to do so (email police)? Is the closer email scrutiny going to create employee morale issues? These are only a few issues brought about by the Purple Communications rule. Purple Communications was difficult to apply and bad law.

The return to the Register Guard standard is a good first step but more is needed to ensure that employees fairly obtain information about both sides of the union issue. In the first place, the modified process of applying the discrimination standard introduced in Register Guard should also be rescinded.[15] Employee solicitation and distribution is just that, no matter what is the form or the object. To arbitrarily subdivide these concepts by allowing solicitation for personal items like an employee softball team schedule but not a union meeting is pure anti-union discrimination, no matter how much the board argues otherwise. Can employees organize a bowling league or a social night out but not a union? The process of determining what falls into each category is arbitrary. Not only does this application lead to a chilling effect on employees' protected rights, but it is also magnet for litigation. The return to the general discrimination solicitation standard in place before Register Guard will insure that employee solicitation and distribution policies are fair and non-discriminatory.

Although not practical, Purple Communication was an effort to solve a problem of unequal communication regarding Section 7 rights. That problem still exists. It is disingenuous to suggest that an employer can meet with employees in captive audience meetings, and have access to contact information for those employees to distribute fliers and pro-employer messages while unions are left trying to get their message across on some sidewalk adjacent to the company parking lot. A fair reading of Section 7 demands that employees get meaningful information from both sides. To solve this lack of communication some novel and controversial proposals are needed.

As labor law is presently applied, employers are required to provide unions with a list of employee names and contact information, called an Excelsior List, *after* a labor election is scheduled.[16] A procedure should be developed to require this information be provided to unions when the union is organizing *before* an election petition is filed.[17] Unions and pro-union employees can then contact employees with information presenting their viewpoint.

Under current board law employers can conduct "captive audience" meetings with their employees while preventing unions from doing likewise. This is not fair. Either unions, with employee union advocates, should be

accorded the same opportunity or employers should be precluded from doing so altogether. Other options might be to require that the employer read and distribute a union statement at the meeting or post a union position statement on the company bulletin board.

The right to join or not join a union has its foundation in the American democratic process. Part of the process requires full information being provided to employees on both sides of the issue. Purple Communications attempted to meet the need - it failed. New labor policies are needed to fully give employees the rights they have been guaranteed under law.

Conclusion

In its latest decision in Caesars Entertainment, the NLRB overruled its past controversial decision in Purple Communication and returned to a policy of protecting and strengthening an employer's property rights. Although the decision is consistent and eliminates the difficulty of applying Purple Communications, it deprives employees of their right to obtain information and meaningfully communicate with others. It is imperative, in the interest of guaranteeing employees their rights under Section 7 of the act that they are provided other means of receiving information about the union. Efforts to equalize the information process must continue. The current process is not fair and the full promise of the NLRA has not yet been achieved.

About the Author

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Endnotes

[1]*Purple Communications, Inc*. 361 NLRB 1050 (2015).

[2]368 NLRB No 143 (December 16, 2019). Chairman John F. Ring and members Marvin E. Kaplan and William J. Emanuel were in the majority with Member Lauren E. McFerran dissenting.

[3]29 U.S.C. Section 157 (1988).

[4]324 U.S. 793 (1945).

[5]*Id*. at n. 10. The Court cited its approval of Peyton Packing Co., 49 NLRB 828 (1943).

[6]*The Guard Publishing Co.*, 351 NLRB 1110 at 114 (2007), *enfd. in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F. 3rd 53 (D.C. Cir. 2009). Hereinafter, the decision will be referred to as *"Register Guard"*.

[7]*Id*. at 1114.

[8]*Id*. at 1117-1119 Rather than treating all employee emails alike, the Board subdivided the emails into those for personal use such as jokes, baby announcements and requests for dog walking services against those for organizing activities. Thus an employer could issue an email rule banning organizing (which has a greater impact on union activity) while allowing employees to send personal emails without being considered anti-union discrimination. This policy clearly projects an anti-union bias.

[9]*Purple Communications, Inc*. 361 NLRB 1050 at 1051-1052 (2015).

[10]*Id*. at 1050.

[11]*Caesars Entertainment*, 368 NLRB No. 143 at 2 (2019).

[12]*Id*. at 2 and 12-13.

[13]*Id*. at 4.

[14]*Id*. at 14-23.

[15]*See* n. 8, *supra*.

[16]Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

[17]A procedure might be established where a union could file with the Board a notice of intent to organize and include one or more signed authorization cards. This would prevent unions from merely requesting employee lists and going on a fishing expedition. Other procedures might also be developed as well.

Training Supervisors on Six Practical ADA Lessons

By David K. Fram

The Americans With Disabilities Act (ADA) is one of the most important and complex pieces of civil rights legislation of the past 50 years. Now that the law is nearly 30 years old, it is crystal clear that effective compliance starts with engaging, practical training for frontline supervisors and managers.

It's critical to train supervisors on *all* aspects of the law, including: what is and is not a covered "disability," what it means to be "qualified," what's required as a "reasonable accommodation," how to enforce safety and conduct rules, and the ADA's very specific requirements concerning asking employees about medical information and guarding the confidentiality of that information.

It has been my experience that supervisors make certain common mistakes. These errors can easily be corrected by incorporating the following six practical lessons as a part of any effective, interactive in-house training program.

Lesson 1: Recognize What Triggers the ADA Interactive Process

In the typical scenario, an employee needing an accommodation mentions this to the direct supervisor, not to human resources. What the supervisor does – or does not do – at this juncture is very important. Does the supervisor pick up on the ADA trigger or does she/he simply miss the cue? Teaching supervisors to listen and recognize when the ADA has been triggered is critical.

Many court cases have illustrated that when an employee tells the supervisor about the need for a workplace change (or that she/he is having trouble doing something in the workplace) because of a physical or mental health condition, that would be enough to trigger the reasonable accommodation process. The employee doesn't need to use any magic language. In fact, the employee doesn't even need to use the words "reasonable accommodation." For example, in Morrissey v. Laurel Health Care Co.,[1] the court held that when the employee told her employer that she could not work more than 12-hour shifts

because of her physical condition, she gave "enough" notice, even though she did not specify her diagnosis.

Similarly, in Lewis v. University of Pennsylvania,[2] the court held that where the employee, who had a skin condition, asked to be exempted from the University Police Department's grooming requirement that he shave his face, that request triggered the interactive process. Likewise, in Palmer v. McDonald,[3] the court held that the employee may have a reasonable accommodation claim where, among other things, he told the employer he had cognitive problems and that he needed additional time to write down the instructions.

Courts have held that even a statement framed as an FMLA leave request could trigger the ADA if it indicates that the employee needs a workplace modification because of a condition that could be a disability. For example, in Arana v. Temple University Health System,[4] the court stated that "an FMLA leave request" can also be an ADA accommodation request.

Role playing is a good teaching tool, giving facts from reported court cases, and asking the supervisors whether the employee had triggered the process under those facts. This engages supervisors and requires them to actively listen and learn.

Lesson 2: Focus on Performance by Asking, "How Can I Help You?"

After an employee initiates the interactive process, I always teach supervisors to stick with five magic words: How can I help you? This allows the employer to make a quick, simple, easy fix if one exists. It also can alert the employer to other laws that might apply, such as the FMLA.

If an employee says, "I'm having trouble getting to work on time because of my new medications," I think it's a great idea for the supervisor to simply ask if she can help. It could well be that the employee only needs to come in a few minutes late for the next week. The supervisor might be able to resolve the issue by temporarily modifying the employee's schedule. This approach is far better than if the supervisor asks the employee about the medications because, as discussed below, an employer is almost always better off if the supervisor - the decision maker - is insulated from medical information.

Of course, if there is not a quick, simple, easy fix, the employer might need to get more information about the individual's medical condition. In these cases, the issue should generally be sent up the chain to an HR professional or a reasonable accommodation coordinator.

If, for example, an employee tells the supervisor that he was diagnosed with cancer, what should be the response? It's best to stick with those same five magic words: How can I help you? The employee might say that he didn't need anything but only wanted to inform the supervisor. In that case, a solid response from the supervisor would be to say thanks and let him know if anything is needed. Alternatively, if the employee had indicated a need for leave time, the supervisor should refer the employee to the appropriate professional who handles FMLA leave.

Lesson 3: Generally Stay Far Away From Medical Information

Asking how to help also allows the supervisor to focus on performance and to stay away from discussing an employee's medical condition. Why is it so helpful to keep supervisors far away from medical information?

Supervisors are hired to supervise. They *need* to know information about how to assist their subordinates do the best job possible. Supervisors might need to know about limitations, but they almost *never* need to know about the diagnosis causing those limitations.

It's a good idea to keep supervisors out of employees' medical information for a number of other legal reasons, many of which involve maintaining an effective defense if the employer is sued.

There have been several ADA cases in which employees have claimed that an employer cannot change a job's functions if the employee, because of a disability, would be unable to perform the new functions. Courts have generally held that employers can indeed change a job's functions, as long as the motivation for the change was

not to discriminate because of disability. In Stevens v. Rite Aid Corp.,[5] the court held that the company was able to change the duties of a pharmacist's job to require the pharmacist to give immunizations. The employer didn't know that the pharmacist had a phobia to needles when it made the change. When a supervisor doesn't know about an employee's medical information at the time he/she makes changes to the employee's job, then the employer has a much more effective argument that the change wasn't discriminatory under the ADA.

Keeping supervisors away from medical information also helps to avoid "regarded as" claims. These claims broadly focus on whether an allegedly discriminatory action was taken "because of" an actual or perceived impairment. If the supervisor didn't know about the employee's impairment, the employer has a good defense to a "regarded as" claim because the action could not have been taken "because of" the impairment. In Mancini v. City of Providence,[6] the court held that a "regarded as" claim requires that "the person who actually made the allegedly discriminatory decision" was "either aware of or perceived the impairment" when taking the action.

Lesson 4: Never Say, "I Can't Afford It"

When an employee asks for a very expensive accommodation, it is a natural instinct for a supervisor to say something like the claim is unaffordable. Saying this can be a terrible mistake, even if it's true, for several reasons.

I am not aware of court of appeals cases where an employer has successfully argued "cost" as the reason an accommodation caused an undue hardship.

Even more importantly, from a practical perspective, if the supervisor claims an inability to pay, the supervisor has made it possible for a plaintiff's lawyer to potentially seek information on everything the employer spends money on (for example, flowers in the reception area or the CEO's chauffeur). No rational employer would ever want to have to defend why it spends money on each of these items. The way to help avoid this is to teach supervisors to *never* raise the issue of cost.

Lesson 5: Understand That Reasonable Accommodation Includes Doing Things Differently

Supervisors need to be trained that, aside from changing physical barriers, reasonable accommodations can also include modifying policies or procedures for a specific employee. In Kindschi v. Federal Express Corp.,[7] the court noted that making an exception to a tardiness policy could be a reasonable accommodation.

Supervisors must understand that a reasonable accommodation might look like "special treatment," something not provided for other employees. In U.S. Airways, Inc. v. Barnett,[8] the Supreme Court noted that, "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e. preferentially." In Sanchez v. US Department of Energy,[9] the court stated that the Rehabilitation Act (which applies ADA standards to the federal government) requires covered employers "to do more than treat disabled and nondisabled employees alike."

Sometimes, supervisors broadly announce that no exceptions will be made to uniformly applied workplace procedures. Of course, no one can blame a supervisor for thinking that this might be wise, especially because we have been training supervisors for decades to treat employees equally. Courts have held, however, that if a supervisor has made such a statement, an employee might have a valid ADA reasonable accommodation claim *even if* the employee never actually requested accommodation, because any request would have been "futile."

The lesson to teach supervisors is that reasonable accommodations can be modifications of established policies and supervisors should rarely, if ever, say "we make no exceptions" to any particular policy or rule.

Lesson 6: Use a Script for Telling Coworkers About an Employee's Accommodation

Let's assume the employer has done everything correctly in accommodating an employee. That's not the end of the matter, because coworkers will inevitably question the supervisor on why the employee appears to be getting something different or special.

Supervisors need to be trained as to exactly what they may tell the coworkers because the ADA forbids the supervisor from disclosing an employee's medical information (including the fact that the employee has a disability covered under the ADA). So, what can the supervisor tell the coworkers who are demanding answers?

The EEOC has written that the supervisor can tell coworkers "that it is acting for legitimate business reasons or in compliance with federal law."[10] It is my belief that a more practical "script" for the supervisor would be to say that the reasons are personal and private and that your personal or private information would not be shared with others. It may be that some coworkers won't be happy with the answer, but it helps the employer to avoid liability for improper disclosure of confidential medical information.

Finally…

It is critical to train supervisors on the ADA's practical requirements because, in so many cases, the supervisor can make or break the case for the employer. The ADA and the cases interpreting the law are so interesting that the training should be fun and entertaining so that supervisors listen and learn. Effective training is the first step in ensuring compliance and limiting employer liability.

About the Author

David K. Fram is the director of ADA training at the National Employment Law Institute. Mr. Fram has spoken and written extensively on the ADA and on public speaking. His newest book, "Raising the Bar: How to Give Outstanding Legal Presentations" provides tips and techniques for lawyers and HR professionals on giving in-house presentations. Nothing in this article is legal advice from Mr. Fram or NELI.

Endnotes

[1]2019 U.S. App. LEXIS 35859 (6th Cir. 2019)

[2]2019 U.S. App. LEXIS 23818 (3d Cir. 2019) (unpublished)

[3](VA), 2015 U.S. App. LEXIS 14677 (11th Cir. 2015) (unpublished)

[4]2019 U.S. App. LEXIS 16960 (3d Cir. 2019) (unpublished)

[5]2017 U.S. App. LEXIS 4985 (2d Cir. 2017)

[6]909 F.3d 32 (1st Cir. 2018)

[7]2019 U.S. App. LEXIS 30938 (9th Cir. 2019) (unpublished)

[8]535 U.S. 391, 122 S. Ct. 1516 (2002)

[9]870 F.3d 1185 (10th Cir. 2017)

[10]EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 18.

A Message from the Chair

Labor and Employment Friends:

The world has changed. So has the practice of law.

The message I had drafted for you all a couple of months ago touted the things our section does so well — six great CLEs, culminating in one the very best conferences in the country (Midwest in October), our law school writing competition and our renewed effort to improve diversity in the section and on section council. My message was as a cheerleader for our bar.

Things have changed. Many of you are working remotely, many are not sure how to return or whether you should return to the old ways of doing things. (When should we begin again to have depositions in person?) Courts are largely closed as of this writing, and it will likely be many l months, or longer, before it is truly safe to hold a jury trial. All of us, from sole practitioner to largest law firm, are deeply concerned about the health and economic well being of our families, friends, colleagues, employees and clients — and our practices.

And, as I revise this message, racial justice in this country has finally, we hope, become vital for all of us.

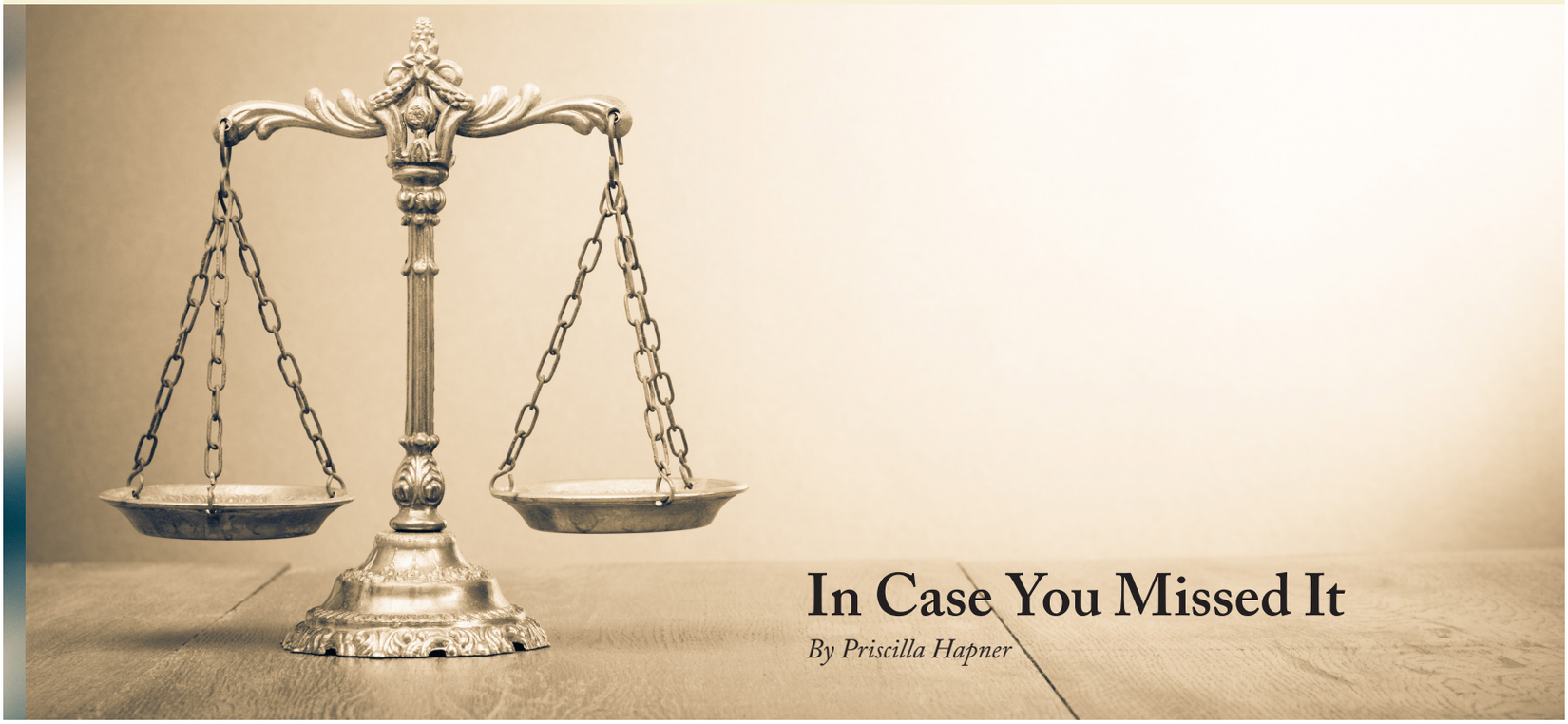
The Labor and Employment Section must address these challenges. We have been and will continue to support our members with timely educational programs — our webcast committee for example has already put on several COVID-19-related programs. Of course, our work on diversity and inclusion within the section has taken on new urgency.

The tag line of the message drafted a while ago is still apt: Labor and employment law in Ohio is in my opinion, despite the incivility and polarization in our society, among the most collegial, practical and helping areas in the practice of law. I am proud of our bar.

I am pleased to serve as your section chair for the next two years. As always, I invite members to call me with questions, concerns or if you just want to talk. If you have ideas about how the section can help our members, or ways we can address racism in our society (and profession) please reach out to me.

John Marshall

OSBA Labor & Employment Section Chair



In Case You Missed It

By Priscilla Hapner

In case you missed it, these are a few brief summaries of recent court decisions (through February 2020) involving employment law.

Supreme Court

- **ERISA.** The unanimous Court held that ERISA's shorter three-year limitations period applies only when the plaintiff gains "actual knowledge" of the alleged fiduciary breach. *Intel Corp. Investment Policy Comm. v. Sulyma*, 589 U.S. ___, No. 18-1116 (U.S. 2-26-20). A plaintiff does not necessarily have "actual knowledge" under §1113(2) of information contained in disclosures which he is provided on a website but does not read or cannot recall reading. The statute "requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information. . . . . To meet §1113(2)'s "actual knowledge" requirement, however, the plaintiff must in fact have become aware of that information." Nonetheless, "actual knowledge" may be proven through "usual ways" at any stage in the litigation, including through "inference from circumstantial evidence." Defendants may also contend that evidence of "willful blindness" supports a finding of "actual knowledge."

- **Section 1981**. The Court confirmed that the evidentiary standard for §1981 race discrimination claims is subject to the but-for or because-of standard which applies to most tort claims. Comcast v. National Ass'n of African American-Owned Media, Inc., No. 18-1171 (U.S. March 23, 2020). In doing so, the Court affirmed the trial court dismissal of a claim brought by an African-American-owned television network which had alleged that the refusal of COMCAST to carry its stations was illegal race discrimination, instead of the asserted lack of programming demand, bandwidth constraints and preference for sports and news programming. The Court rejected arguments that §1981 only required that race be a motivating factor and that a complaint's allegations need not be as strong as the evidentiary burden at trial. "The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation."

- **Federal employment claims**. The Court held that the standard for federal employees to prove discrimination is less than the standard which applies in the private sector. Federal employees alleging violation of the Age Discrimination in Employment Act need only to prove

that age was a factor in the decision or process when seeking injunctive relief instead of but-for causation, which is still necessary for federal employees to recover compensatory damages. Babb v. Wilkie, No. 18-882 (U.S. April 6, 2020). "The plain meaning of the critical statutory language ("made free from any discrimination based on age") demands that personnel actions be untainted by any consideration of age."

Sixth Circuit

- **Fair Share Fees**. The court unanimously affirmed that a school employee was not entitled to a refund of her "fair share fees" paid prior to the Supreme Court's decision in *Janus v. AFSCME, Council 31*. *Lee v. Ohio Ed. Ass'n*, 952 F.3d 386 (6th Cir. 2020). Even if the *Janus* decision applied retroactively, the union was entitled as an affirmative defense to rely in good faith on existing law when it previously collected the fair share fees. "[W]hile a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983" for its reliance on existing legal authority. The court rejected exceptions to the defense for equitable restitution and similarly rejected state law claims for conversion.

- **Similarly-Situated**. A divided court affirmed the employer's summary judgment on a race discrimination claim because the plaintiff failed to identify a co-worker who was sufficiently similar in all relevant respects. *Johnson v. Ohio Department of Public Safety*, 942 F.3d 329 (6th Cir. 2019). The court found that the plaintiff's misconduct was more egregious than and not sufficiently comparable to his co-worker's misconduct when he asked out intoxicated women whom he had arrested while in uniform and had actually driven one of the women home, while the co-worker had only sent two off-duty Facebook friend requests. Further, the plaintiff had been placed on a Last Chance Agreement after he pulled over a woman without probable cause in order to ask her out when the other had not. Moreover, the first allegation against the co-worker had never been verified. In addition, they had different supervisors. Finally, they were disciplined for slightly different offenses and subjected to different standards because of the Last Chance Agreement.

- **Pretext**. The court affirmed an employer's summary judgment on an ADEA claim where the plaintiff had been fired by the new executive director without any explanation, but was later justified by the mismanagement documented (by the state controller) of two of her departments and her toxic relationship with subordinates (as reflected by numerous complaints) even though she received no progressive disciplinary action. *Miles v. South Central Human Resources Agency, Inc.*, 946 F.3d 883 (6th Cir. 2020). The court found there was nothing suspicious about refusing to give her an explanation for her termination until she filed her EEOC Charge because the eventual explanation did not conflict with the lack of explanation during her termination meeting. "'[P]roviding additional, non-discriminatory reasons that do not conflict with the one stated at the time of discharge does not constitute shifting justifications.'" The court reiterated that employers are not required to give employees any explanation for their termination. She could not prove the lack of a factual basis for her termination based on the employer's failure to investigate the many complaints by her subordinates because it was the number of complaints, not their accuracy, which supported the employment decision. "Terminating an employee only because of complaints from her subordinates— without investigating the merits of those complaints—may be unwise, but that's not the question here." The plaintiff could not identify similarly-situated comparators by identifying two of her subordinates whose culpability and performance standard was less than her own or by comparing herself to two peers who were fired for cause 10 days earlier after admitting their culpability in the mismanagement. At the pretext stage, the comparators must have engaged in substantially identical misconduct to be relevant even though a more relaxed comparison is made at the *prima facie* stage. She also could not rely on statistical comparisons without evidence of the ages of employees who retained their positions. Finally, she could not rely on comments made six months later about trying to recruit young people because they were irrelevant to the termination of her employment. "Even if [the employer] wanted to attract young people, that says nothing about terminating older employees."

- **FMLA**. The court reversed an employer's summary judgment on an FMLA claim because the employer's perfect attendance system (which reduced attendance

points under its disciplinary policy) made exceptions for pre-scheduled leave (i.e., holidays, military leave, jury duty, bereavement leave, and union leave), but not FMLA leave. Dyer v. Ventra Sandusky, LLC, 934 F.3d 472 (6th Cir. 2019). The employer's no-fault attendance system did not assess attendance demerits for FMLA absences, but would only "roll back" attendance demerits after 30 consecutive days of perfect attendance under its system (which did not consider FMLA absences to be perfect attendance). The plaintiff had been fired under the no-fault attendance policy and argued that he would not have been terminated if the employer had given him credit for perfect attendance when he took FMLA leave. The court found that "denying a valuable term or condition of employment to an employee taking FMLA leave interferes with the right to take that leave." In short, " FMLA leave could freeze the accrual of attendance but could not reset it; upon returning, [the plaintiff] was entitled to the days of attendance he had accrued when leave began and to continue accruing them in the same way."

- **Retaliation**. The court affirmed a $414,600 jury verdict for compensatory and punitive damages, back pay and front pay as well as $157,734 in attorney's fees for retaliation claim brought by a former supervisor who claimed that she had been demoted on account of her gender and retaliated against when she complained internally and to the EEOC. Hubbell v. FedEx Smart Post, Inc.,933 F.3d 558 (6th Cir. 2019). The plaintiff produced sufficient evidence to show that the employer had engaged in conduct towards her that would deter a reasonable person from exercising her protected rights through discriminatory disciplinary actions, surveillance and payroll policies. Further, some of the actions occurred close in time to her protected conduct. Finally, "the law in this circuit, however, is that a written anti-discrimination policy does not by itself shield an employer from punitive damages," especially when there is evidence that the employer did not necessarily follow its own policies or investigate the plaintiff's internal complaints of discrimination.

- **USERRA Retaliation/Cat's Paw**. The court reversed an employer's summary judgment in a USERRA retaliation case on the grounds that the plaintiff produced sufficient direct evidence of discrimination to proceed under a cat's paw theory. The employer's explanation was clearly pretextual when the plaintiff had been fired, in part, for engaging in conduct that violated corporate policy as directed in a text message by his allegedly biased manager. Hickle v. American Multi-Cinema, Inc., 927 F.3d 945 (6th Cir. 2019). The employer could not rely on an honest belief defense when the investigator (i) did not interview witnesses to the biased threats to terminate the plaintiff for a pretextual reason on account of his military service and (ii) supported the termination of the plaintiff in part for violating a policy at the clear written direction of his manager who was allegedly biased against him.

- **COBRA**. The court reversed an employee's summary judgment finding that COBRA had been violated because the employer failed to send a COBRA continuation notice when the employee began a medical/workers' compensation leave of absence or when it stopped paying her premiums even though her medical insurance premiums began to be paid from her workers' compensation payments upon the commencement of the leave. Morehouse v. Steak N Shake, 938 F.3d 814 (6th Cir.2019). In reversing, the court concluded that the change in payment method and continuation of her medical insurance rendered her reduction in hours (i.e., medical leave) irrelevant and that the later loss of coverage was caused by the employee's failure to pay her insurance premiums when she was notified that the employer stopped paying them a few months later. "[A]ltering the contribution method alone, as [the employer] did here when it began deducting premiums from [the employee's] workers' compensation checks, does not inherently change the 'terms and conditions' of coverage and therefore does not produce a 'loss in coverage.'" Accordingly, "no qualifying event occurred that would have triggered a mandatory COBRA notification" even though the employee stopped reporting to work because she did not "'cease to be covered under the same terms and conditions' when [her] contribution method was altered" by deducting the premium from her workers compensation benefits instead of her paycheck.

- **ADA/Transfers/Attendance**. The court rejected an employer's summary judgment on an ADA claim on the grounds that a factual dispute existed as to whether vacant light duty positions existed into which the employee could have been transferred as an accommodation. *Fisher v. Nissan North America, Inc.*, No. 18-5847 (6th Cir. 2-26-20). The court concluded that even if the employee was not explicit about requesting a transfer into such a position, the employer was obligated to educate the employee about possible vacant positions into which he could transfer. Further, the court seemed to indicate that an employer would almost never be permitted to terminate an employee based on an inability to report to work because of a disability unless the employee was never going to be able to report or was unqualified for a reason unrelated to his or her disability. "For purposes of the "otherwise qualified" analysis, absenteeism that can be cured with a reasonable accommodation is treated differently" than other job requirements. Finally, the court found that the employer was to blame for a breakdown in the interactive process because it failed to respond to his transfer requests by explaining why the positions were unsuitable or making other suggestions even though it had granted several prior accommodations, including other transfers and medical leaves.

Ohio Supreme Court

- **Public Policy Wrongful Discharge**. A divided Court concluded that the plaintiff's discharge for protesting her payroll stubs' failure to accurately report her income "does not jeopardize any public policy that employers must accurately report employees' pay and tips to the Bureau of Unemployment Compensation." *House v. Iacovelli*, Slip Opinion No. 2020-Ohio-435. The Court found that the existing statutory structure and penalties on employers were sufficient to protect public policy. Therefore, "a personal remedy is not necessary to discourage wrongful conduct by employers . . . " Further, the unemployment tax statutes cited by the plaintiff do not prohibit retaliation against whistleblowers.

- **Probationary Employment**. The Court concluded that the civil service statutes at "R.C. 124.27(B) and 124.56 . . . do not express a clear public policy providing the basis for a wrongful-discharge claim by a probationary employee." *Miracle v. Ohio Dept. of Veterans Servs.*, Slip Opinion No. 2019-Ohio-3308. The complainant had been

fired during his probationary period just days after a positive performance evaluation. "R.C. 124.27(B) and Ohio's civil service scheme as a whole do not express a clear public policy that would support recognizing a wrongful-discharge tort for probationary employees."

- **Employer Subdivision Immunity**. A divided Court affirmed the rejection of the County's political subdivision immunity defense on a false light claim brought by a former employee. The Court found that former employees fit within the immunity statute's exception when the claims arose out of the employment relationship. Plaintiffs were not required to still be employed when filing the claim. Further, the Court found that the public statements made about the plaintiff's termination were sufficiently related to her employment to be covered by the statutory exception to subdivision's tort immunity. Piazza v. Cuyahoga Cty., No. 2019-Ohio-2499. "There is no temporal limitation in R.C. 2744.09(B) that requires an ongoing employment relationship, either at the time a plaintiff's claim against a political-subdivision employer accrued or at the time the plaintiff filed the claim against her political-subdivision employer. There must, however, be a causal connection between the claim and the plaintiff's employment relationship, whether ongoing or terminated, with the political-subdivision employer."

Ohio Courts

- **Unfair Competition**. The Hamilton County Court of Appeals affirmed the dismissal of a breach of contract claim brought by an employer against a former employee when the parties had entered into a termination agreement with a mutual release even though the employee never signed a replacement agreement as verbally agreed. Nonetheless, the court reinstated the employer's common law and statutory claims and specifically found that employees are subject to trade secret and breach of fiduciary duty claims even in the absence of a written employment agreement. It also reinstated tortious interference and spoliation claims against the employee's new employer based on the alleged theft of a customer list and the employer's destruction of the stolen list after it learned of the employee's misconduct. *Retirement Corp. of Am. v. Henning*, 2019-Ohio-4589.

- The Portage County Court of Appeals issued an opinion addressing the confidentiality of workplace investigation notes, reports, recommendations and recordings of witness interviews when the employer's attorney conducted the investigation and interviews. Smith v. Technology House, Ltd., 2019-Ohio-2670. The defendant employer had broadly asserted its Faragher/Ellerth affirmative defense of taking prompt remedial action, but had not specifically cited to its attorney's investigation as the basis for that defense. Nonetheless, the trial court found that the interview recordings, report and recommendations should be produced in discovery. The Court of Appeals reversed in part on the grounds that the employer had not specifically waived attorney-client privilege or yet asserted that the investigation was the basis for its defense, but held that the recording of the plaintiff's interview must be produced because she was clearly adverse to the employer at the time and had her own attorney. It also ordered an in camera inspection of the investigation materials to determine what else may be outside privilege and work product protection because it predated the investigation, etc. Finally, it noted that privilege may not be used as both a sword (i.e., defense) and shield (confidential).

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About *Labor and Employment News*

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Designed by Dan Petrovski.

Editors' Note—Guest Columns

Anyone interested in submitting an article for publication in the Labor and Employment Law Section newsletter are encouraged to contact the newsletter editors, Robert Fekete (Columbus), Joseph D'Andrea (Columbus) and Alan Zmija (Cleveland) by email at Robert.Fekete@serb.ohio.gov, joseph.dandrea@squirepb.com and alanzmija@yahoo.com. Articles should not have appeared in other publications, but works appearing only on your employer's website or client newsletter will be considered with the employer's approval. Articles will typically range between 1 to 10 pages but works outside of those limitations will be considered. The editors reserve the right to select articles for publication, to decline to publish any article and to require the editing of an article to make it appropriate for publication.

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